
(2009) 01 BOM CK 0117

In the Bombay High Court

Case No : Notice of Motion No. 2220 of 2007 in Suit No. 3938 of 2001

Jamuna Darshan Co-operative Housing Society Ltd. and
Others

APPELLANT

Vs

J.M.C. and Meghani Builders and Others

RESPONDENT

Date of Decision : 12-01-2009

Acts Referred:

Development Control Rules, 1991 — Rule 9
Maharashtra Ownership Flats (Regulation of the promotion of construction etc.) Rules,
1964 — Rule 5, 8, 8
Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale,
Management and Transfer) (Amendment) Act, 1986 — Section 3(2), 4(1), 6, 7(2)
Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale,
Management and Transfer) Act, 1963 — Section 10, 3, 4, 7, 7(1)

Citation : (2011) 4 BomCR 185

Hon'ble Judges : Dharmadhikari S.C., J

Bench : Single Bench

Advocate : A.V. Anturkar and Sukeshi Bhandari, D.J. Khembete, Cou., instructed
by Mahimtura and Company, for the Appellant; Pravin Samdani, Sr. Cou., Ajay
Panicker, for Defendant Nos. 1 to 4, B.Y. Sanglikar and A.G. Damle for Defendant
Nos. 5 to 7, for the Respondent

Judgement

Dharmadhikari S.C., J

1. This is a Notice of Motion by the Plaintiffs. The Plaintiffs have instituted Suit No. 3938 of 2001 in this Court on 21st September, 2001 against the Defendants for an order and decree directing them to complete the statutory obligations under the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963. (For short Ownership Flats Act.) They also claim a direction for compliance by the Defendants of the various agreements entered into with the members of the Plaintiff No. 1 society so also with the Plaintiff Nos. 2 and 3 specifically.

2. The further relief that is claimed is for an order and decree to transfer and

convey the right, title and interest of the Defendants in the property bearing Final Plot No. 774 and more particularly described in prayer Clause (b) of the plaint. There are other reliefs which are claimed as a consequence to the above and further prayer Clause (e) of the plaint is for a mandatory order and injunction directing the Defendants to hand over all the documents of title in respect of the above immovable property including sanctioned plans, commencement certificates, occupation certificates and completion certificates. By prayer Clause (h) of the plaint, a declaration is claimed against the Defendants to the effect that they have No. right, title or interest in the property alongwith its hereditaments and structures standing thereon and therefore, they should be restrained by a permanent order and injunction as claimed in prayer Clause (i) from entering upon or carrying on construction activity and/or dealing with and/or creating any third party rights in respect of the property.

3. The plaint proceeds on the basis that the Plaintiff No. 1 is in continuous and exclusive use and occupation so also possession of the immovable property more particularly described in Annexure A to the plaint. It is stated that the building constructed on the property consists of stilt plus 7 floors comprising of 28 tenements and 7 shops. The Plaintiff No. 1 has 35 members all of whom have purchased flats and/or garage /shops in the building which was constructed by the 1st Defendant. They are the flat purchasers within the meaning of the Maharashtra Ownership Flats Act. It is alleged that the Plaintiff Nos. 2 and 3 are the members of the Plaintiff No. 1. They had purchased Garages by entering into Agreements for purchase of the same. The 1st Defendant had agreed to sell the said garages. The 1st Defendant is a "Builder" and "promoter" of the building of the Plaintiff No. 1. He is the promoter within the meaning of the said term as defined in the Maharashtra Ownership Flats Act. The Defendant Nos. 3 and 4 claim to be the purchasers of shop Nos. 5-A and 6 A. They claim to have purchased these shops from the Defendant No. 1 under an agreement for sale dated 3rd March 1994 and 23rd March 1994. It is therefore, clear that they have been impleaded after the suit was filed. Similarly, Defendant Nos. 5 to 7 have also been impleaded as party Defendants in the suit as they claim to be the original owners of the land. The Defendant No. 1 has filed Suit No. 729 of 1981 against the Defendant Nos. 5 to 7 in this suit for specific performance of the agreement for sale of the land which is covered by the instant suit. They therefore, have been joined as party Defendants to this suit more particularly because Suit No. 729 of 1981 is pending in this Court.

4. The Plaintiffs claim proceeds on the basis that in or about 1979-80 the 1st Defendant approached the individual flat purchasers all of whom are now members of the Plaintiff No. 1 with a proposal to construct a building on the suit land. The manner in which the persuasion took place is set out in paragraph 3 of the plaint. It is stated in paragraph 3 of the plaint that the 1st Defendant represented to the individual flat purchasers that they would be handed over the flats in the building which would be constructed on the land. The building will be complete in all respects. The 1st Defendant would provide the Recreation area,

Garden and also Garages in an open area in the rear part of the building. It is stated that the transaction would be subject to terms of the Ownership Flats Act and rules. Each of the members of the 1st Plaintiff entered into agreements for purchase of the flats and/or shops/ garages. One of the agreement is annexed as Annexure B to the plaint. The details of other agreements with regard to the garages are set out in paragraph 4.

5. In paras 5, 6 and 7 of the plaint, it is stated thus:

5. The Plaintiffs state that the plan for development of the suit building was sanctioned on 6th March, 1980 on which date commencement certificate was also granted in favour of the Defendant. The Plaintiffs further state that by this date, the Defendants had sold 50% of the total number of flats to individual flat purchasers. The balance of the flats were sold by 1981-82. However the Defendants failed and neglected to complete the construction within the stipulated date although many of the individual flat purchasers had made full payments towards the flat well before the stipulated dates. The Plaintiffs state that in the meanwhile the Defendants also continued to collect various sums of monies from the individual flat purchasers under various pretexts such as taxes, maintenance, miscellaneous outgoings etc. although the same were payable by the Defendants. The Plaintiffs state that thus the Defendants took full advantage of the fact that most of the individual flat purchasers and/or their earning members were employed abroad. The Plaintiffs crave leave to refer to and rely upon the various demands made and the receipts issued to the individual flat purchasers in respect of various payments made to him as and when produced. Hereto annexed and marked as Exhibit E is a list of the individual flat purchasers with the date of the agreement.

6. The Plaintiffs state that the agreements executed by the Defendants are subject the provisions of the said Act. In addition to this fact the Defendants is required to fulfil other conditions and requirements under the law. The following is a list of the promises and assurances given by the Defendants which they have failed to do so:

(i) The Defendants was duty bound to give inspection of the plans and specifications of the building approved by the Bombay Municipal Corporation. This was not done. Further the Defendants was required to notify changes to the Plaintiffs and/or take the Plaintiffs permission before effecting changes in the building plans. This also was not done. Further, the location of the meter room was changed from its initial proposal/position facing the main gate to the rear side of the building, this has been later shown to the Bombay Municipal Corporation as a parking space. This was done without sanction of the Bombay Municipal Corporation. These changes were done solely with a view to make fraudulent misrepresentations to the Bombay Municipal Corporation in order to obtain the sanction for further construction of another building on the suit property or to make addition or alteration in suit building later on.

(ii) The Defendant was also required to make a full and true disclosure of all outgoing (including ground rent if any, municipal or other local taxes, taxes on income, water charges and electricity charges, revenue assessment, interest on any mortgage or other encumbrances if any). The Defendants were also obliged to maintain separate accounts of sums taken as advance or deposit and to be trustee therefore and to disburse them for purposes for which they were given. The Defendants was also responsible for payment of outgoing till the property is transferred.

In spite of several requests, No. details were given to the Plaintiffs. On the other hand, the Defendants would periodically collect increasing amounts from individual flat purchasers towards these charges without giving any details or accounts. Also as a result of the failure on the part of the Defendants to comply with his statutory obligations the Plaintiffs had to incur considerable expenditure and harassment. Hereto annexed and marked as Exhibit F is a statement of the monies payable by the Defendants to the Plaintiffs incurred on account of his failure and neglect to fulfill his statutory obligations in respect of the suit property,

(iii) u/s 10 of the said Act the Defendants was obliged to form a co-operative society of the individual flat purchasers within four months of the minimum number of the persons required for the same. By 1980-81 the minimum number of persons required for the formation of the co-operative society of individual flat purchasers was met thus by 1981 the Defendants was obliged to form and register a co-operative housing society u/s 10 of the said Act. In spite of several requests by the individual flat purchasers the Defendants failed and neglected to do the individual flat purchasers finally got together and registered themselves as the Plaintiff No. 1 society on 10th October, 1990. The Plaintiffs crave leave to refer to and rely upon the registration certificate of the society when produced,

(iv) The Defendants has deliberately failed and neglected to erect garages as per the agreements entered into by the Defendants with the respective garage purchasers.

7. The Plaintiffs state that although as per Clause 5 of the agreement for sale possession of the flats was to be handed over to the respective flat purchasers by December 1981 the Defendants failed to do. The Plaintiff state that sometime in 1984, the Defendants represented to the flat purchasers that the building was complete in all respects and was ready for possession as the Bombay Municipal Corporation had granted a permission to use and occupy the flats. The Plaintiffs state that relying upon the representation made by the Defendants the flat purchasers took possession of the flats. The Plaintiffs further state that after taking possession the flat purchasers realised that the Defendants had not completed construction of the suit building in accordance with the sanctioned plans. The Plaintiffs therefore, state that the Plaintiffs repeatedly requested the Defendants to complete the construction in accordance with sanctioned plan. However, the Defendants failed and neglected to do so also the Defendants had

failed and neglected to construct any garages and /or garden/recreation as promised.

6. There are several complaints with regard to amenities and failure to obtain occupation certificates. It is alleged that the Defendant No. 1 is not a member of the Plaintiff No. 1 society in respect of the shops and flats in its possession. After setting out the relevant details pertaining to payment of land revenue and government dues, it is pointed out that there was a litigation with regard to the agreements inasmuch as the 1st Defendant sought to terminate the agreement entered into with individual flat purchasers and a Suit being Suit No. 5432 of 1993 filed by the 1st Defendant against the Plaintiffs. So also filing of another Suit being Suit No. 4611 of 1993 seeking an injunction against the Plaintiff No. 1 preventing the 1st Defendant from carrying out construction or erection of temple in the property. But that suit was withdrawn by the 1st Defendant.

7. It is stated that during the pendency of Suit No. 5432 of 1993 the 1st Defendant took out Notice of Motion No. 217 of 1999 seeking an injunction against the Plaintiff No. 1 members from interfering with and/or obstructing and/or intermeddling with further construction work on the suit property. It is stated that the 1st Defendant alleged that the BMC has approved the plans on 1st November, 1996 vide its letter No. CE1577/LOR. This Notice of Motion was dismissed by the learned Judge in the City Civil Court and even an Appeal from Order filed to challenge the order of dismissal came to be dismissed by this Court on 27th July, 2001.

8. Therein, it is revealed for the first time that the BMC granted the commencement certificate. Therefore, in paragraph 14 of the plaint in this suit, the facts pertaining to completion and occupation certificates from the BMC have been set out. It is alleged that while obtaining occupation certificate and completion certificate, the 1st Defendant made a false and fraudulent representation to the BMC. The BMC was not told that the area which was to be allotted as garden or the recreation area for the Plaintiff No. 1, is now proposed for further construction activity by the 1st Defendant. Therefore, suppression with regard to this OC and CC is pointed out in paragraph 15 of the plaint with relevant details. Subsequently, the suit of Defendant No. 1 itself was dismissed is the fact which is set out in paragraph No. 16 and thereafter it is alleged that the Plaintiffs approached the Defendants and called upon them to fulfill their obligations under the Act but, the Defendants failed and neglected to do. so. They have not conveyed the suit property to them. Instead, it is alleged that some construction activity is likely to commence on the suit property and that is why it has become necessary to seek the reliefs.

9. In terms of the aforesaid prayers, interim reliefs are sought in the Notice of Motion. Prayer Clause (e) of the Notice of Motion reads as under:

(e) that pending the hearing and final disposal of this suit the Defendant No. 1 (acting either by themselves or through their agents, servants representatives or

persons claiming under them or on their behalf) be restrained by temporary order and injunction from entering upon or carrying on any construction activity and/or creating any right, title interest in respect of the property bearing final plot No. 774 of the Bombay Town Planning Scheme No. III (BOM) situated at Off Natakwala Lane, Opposite S.V. Road, Borivali (West) Mumbai - 400 092 along with hereditaments and the structures standing, thereon. :

10. Both sides have addressed me principally on this relief. They have addressed me on the basis of the provisions of the Ownership Flats Act. It is pointed out by the Plaintiffs in the affidavit in support of this Notice of Motion that there is an open plot of land at the rear side of the building. That portion/ plot admeasures 206.66 sq. meters. It is stated that this plot is reserved for parking of vehicles and for recreation garden. The Defendant No. 1 did not provide the same as promised under the agreement for sale as also in terms of one of the conditions of IOD. This is a plot which is part and parcel of the entire plot admeasuring 2048.9 sq. meters. The open space is an amenity plot for reservation garden parking etc. It is contiguous with the plot of land appurtenant to the building.. It is alleged that the Defendant No. 1 wants to put up further construction on this open space/amenity plot by falsely claiming additional FSI. This is the construction which the Defendant No. 1 desired to put up and therefore moved a Notice of Motion in the City Civil Court suit which came to be dismissed. Therefore, the Defendant No. 1 cannot put up any such construction. In any case there is no balance FSI available to put up any construction on the plot.

11. With regard to this relief and allegations in the affidavit in support the Plaintiff have relied upon the annexures to the plaint so also agreements entered into with the individual flat purchasers. They have also relied upon order passed by the City Civil Court on 6th August, 1999 in Notice of Motion No. 217 of 1999 in Short Cause Suit No. 5432 of 1993.

12. There is an affidavit in reply filed by the 1st Defendant on 25th June 2007 and as far as this aspect is concerned, it is contended that final plot No. 744 (suit property is concerned) conveyance of the land is not yet given to the 1st Defendant by the registered owner. (Defendant Nos. 5 to 7 in this suit). It is pointed out that there is a dispute in that behalf and Suit No. 729 of 1981 is pending before this Court. The matter is thus sub-judice. The break up of the property tax assessment numbers for final plot have been given and it is then contended that the developer developed plot bearing R.N. No. 4048 (1) and constructed building No. 1 on the said portion of this plot. This plot was part of final plot No. 774. On the second portion, i.e. R.N. No. 4048 (1-A) of Final Plot No. 774, the developer was to construct a new building No. 2 for which a plan was submitted which was approved along with building plan for building No. 1. Building No. 1 consists of stilt plus 7 floors consisting of 28 flats and 7 shops. Plot No. 1 was numbered as A building and the co-operative housing society was named as "Jamuna Darshan A Wing co-operative Housing Society Ltd." Reliance is placed by the developer in the affidavit in reply in para Nos. 22 and 23 on this

aspect. It is emphasised that building No. A was constructed by utilising only part FSI available on plot No. 774. For putting up additional building using balance FSI the developer applied for sanction and the plan was sanctioned on 1st November, 1996. The IOD was issued and BMC issued a commencement certificate dated 27th September, 1997. The commencement certificate has been extended from time to time. Lastly, it has been extended on 24th May 2007 on payment of revalidation fees.

13. Finally, reliance is placed upon Clause Nos. 1, 8 and 9 of all the agreements for sale executed by the developer with the flat purchasers and it is contended that the intention of the developer to carry out further construction on plot bearing R.N. No. 4048 (1-A) of final plot No. 774 was known to the flat purchasers. Reliance is placed upon the agreement for sale dated 5th May, 1982 in that behalf.

14. Therefore, according to the developer, it is false to suggest that any open space is being utilised or exploited by the developer. As far as provision of the open space is concerned, in paragraph No. 26 of the reply it is stated that 18 parking spaces in the open and stilt area have been provided. Therefore, there is No. more obligation to provide parking spaces. 15% of the plot area for R.G. as per D.C. rules has been already made and a recreation ground is provided to the society. It is contended that the developer is entitled to utilise the balance FSI available on plot No. 774 by putting up additional building as per building plan sanctioned by the Municipal Corporation. Therefore, there is No. question of any consent for approval of the flat purchasers being obtained for further construction. For all these reasons, it is prayed that No. relief be granted in terms of prayer Clause (e) of the motion and the motion be dismissed.

15. The Plaintiffs have filed a rejoinder and have contended that the developer's stand is incorrect and the provisions of the Ownership Flats Act cannot be violated by him in this manner. The rejoinder affidavit of 5th July 2007 in paragraph 27 of the same deals with compliance with the Ownership Flats Act. Reliance is placed on Section 7A of the Ownership Flats Act and it is contended that additional construction can be put up only if a provision is made in the original lay out so also after obtaining consent from the existing society. It is urged that in the present case the 1st Defendant has not made any provision in the original layout for putting up additional buildings and even otherwise there is No. FSI available. It is urged that the proposed addition under the revalidated plan is based upon utilisation of FSI for balcony etc. for which a provision was made in the price for each unit/flat. It is urged that by virtue of any change in the policy for FSI of Balcony etc. the benefit is available to the society. Therefore, the BMC could not have validated the plans as submitted by the Defendant No. 1. Therefore, it is urged that the motion be made absolute. There are further affidavits filed on this aspect by both sides. In the further affidavit of the Plaintiffs, which has been affirmed on 12th February 2008 it is urged that the 1st Defendant developer has proposed to put up construction of the second building

of the open space which is meant for garden and car parking. The commencement certificate of the building which is occupied by the Plaintiff No. 1 was granted on 14th January 1980. It was for one building. No. provision was made by the Defendant No. 1 in the layout for construction of the second building. The building of the Plaintiff was constructed in the year 1984-1985 and possession of the flats was handed over to the flat purchasers sometime in the said year. The flat purchasers themselves formed a society and after repeated requests the occupation certificate was obtained by the Defendant No. 1 in the year 1997. The 1st Defendant therefore, could not have made any alterations in the provision made for car parking and amenities. The original sanctioned plan of 1980 and the occupation certificate issued in 1997 does not enable the 1st Defendant to put up any additional construction. It is clear that the plans are approved by the BMC. They have been approved without the Plaintiff society granting its approval or consent. Illegalities and irregularities set out in the plaint are once again highlighted in this affidavit by the Plaintiff. The 1st Defendant has purported to deal with this affidavit and it is pointed out that the open space has been utilised for further construction. The further affidavit which is filed by the Plaintiff on 25th August 2008 encloses the copies of the plans dated 14th August, 1980, 6th March 1997 and 1st November, 1996.

16. With the above material the matter was placed before me for hearing and final disposal. Notice of Motion No. 3239 of 2008 which was moved by the applicant-Maharashtra Chamber of Housing Industry was also placed along with the Plaintiff 's Notice of Motion. Although the intervention was permitted considering the view that I have taken in the Plaintiffs Notice of Motion, it is not necessary to enter into and decide any wider controversy.

17. I have heard Shri. A.V. Anturkar learned Counsel appearing on behalf of the Plaintiff, Shri Pravin Samdani, learned Senior Counsel appearing for the Defendant No. 1 and Shri B.Y. Sanglikar appearing on behalf of the Defendant Nos. 3 to 5. With their assistance I have perused the plaint, and the annexures thereto so also the Notice of Motion and all the replies/rejoinders and further affidavits filed on record. I have also perused with their assistance the annexures to these affidavits and relevant statutory provisions so also the decisions brought to my notice.

18. The argument of Shri Anturkar is that the society is the owner of the building and is entitled to land beneath the same so also appurtenant thereto. Further, the developer is obliged to provide open spaces and amenities. Everything has to be conveyed to the society. The same is the society's property. Once the land has to be conveyed to the society so also the amenities then all benefits attached to the land and going alongwith it also belongs to the society. The 1st Defendant is a promoter within the meaning of the said term appearing in the Ownership Flats Act. Once it is held it to be a promoter and satisfies the criteria laid down in that be-, half, then, the 1st Defendant cannot wriggle out of the statutory obligation. It is contended that the relevant statutory provisions mandate that

the title has to be conveyed to the society by the developer/ promoter after the construction is completed and within the time prescribed by Rule 9 of the Rules. After registration of the co-operative housing society, the land has to be conveyed. Once the cooperative housing society is registered, but the conveyance is not executed and in this case proceedings are pending, then, it is not open for the 1st Defendant developer to develop the land by allegedly utilising the balance FSI. The land and the balance FSI is the property of the society. The property is being held in trust by the developer for cooperative housing society. It is contended that as soon as the corporation issues the occupation certificate and the society is registered, the building as well as the stilt parking spaces the open spaces and all common amenities become the property of the society and four months time is provided, if any other period is not mentioned in the agreement. Under Clause 13 of the model form of agreement the period is binding on the developer. Therefore, the obligation to convey the property has to be fulfilled. Since it is not fulfilled, the suit is filed and as long as the suit is pending and the controversy is at large, No. construction activity should be permitted in the remaining portion/land. If any such activity is commenced and completed without the consent and approval of the Plaintiff No. 1 society, then, that would amount to society being divested of its rights in the property, contrary to law. This is not permissible. Admittedly, there is No. approval and consent of the society. Further, in the original lay out the additional building is neither proposed nor provided. There are No. details with regard to any balance FSI made available to the Plaintiffs. Hence, without following the mandate of Section 7 and 7A of the Ownership Flats Act the builder/promoter could not have got the plan approved for further construction. Having got them approved clandestinely and without disclosing that the land has to be conveyed to the society, No. construction activity can be commenced and completed relying upon the sanction/approved plans and the commencement certificate. Presently, digging work is going on at site. There is fencing and compound erected by the 1st Defendant. If it completes the activity proposed at site then the suit itself will be rendered infructuous. Another building would come up at the site which is the property of the existing society. If another building comes up and flats/units are occupied, then, apart from congestion and chaos it will defeat and frustrate the rights of the Plaintiffs in the property. In such circumstances, all three ingredients namely prima facie case, balance of convenience, and irreparable loss are satisfied and therefore, injunction as prayed should be granted.

19. Shri Anturkar has placed heavy reliance upon the decision of the Supreme Court rendered in the case of Jayantilal Investments Vs. Madhuvihar Co-operative Housing Society and Others, . Reliance is also placed upon an order of the learned Single Judge dated 25th June 2008 rendered in Notice of Motion No. 1966 of 2008 in Suit No. 1698 of 2008.

20. On the other hand, Shri Samdani, learned Senior Counsel appearing for the 1st Defendant has contended that in the present case all agreements for sale of

flats are prior to 1984. The agreements themselves contain a stipulation that the flat purchasers are aware that the developer is constructing a building known as "Jamuna Darshan A and B " on the land described in the first and second schedule of the agreement, entered into with the flat purchasers, individually. The plans and specifications have been inspected by the flat purchasers. The flat purchasers have agreed with the 1st Defendant that any variations, modifications, additions and alterations as may be required to be done by the government, BMC or any other local authority can be done on account of construction of additional floors over the said building and on any other building or buildings for any other purpose. The right of the 1st Defendant to make changes, alterations, amendments, additions in the plans and in the building from time to time without the permission of the Plaintiffs and/or the flat purchasers has been clearly understood and remains unaffected by the agreement to sell the flats. Clause No. 6 also gives a clarification inasmuch as the purchaser has No. claim over and except in respect of a particular flat garage/ parking space agreed to be sold and acquired and all open space/spaces, lobbies, staircases, lifts, terraces etc. will remain the property of the builder until the whole property is transferred to the co-operative society and even such a transfer is subject to the rights of the flat purchasers. Further, Clause Nos. 8 and 9 are specific clauses which amply clarify and preserve the right of the developer to utilise the FSI for putting up further floors on the existing building or construct any other building in the property.

21. That apart, according to Shri Samdani the provisions of the Ownership Flats Act so also the law laid down in *Jayantilal v. Madhu Vihar*'s case will not apply. The plans for the second building have been sanctioned in 1996 whereas the occupation certificate in respect of the Plaintiffs building has been granted way back in 1987. It is understood that the occupation certificate is for building No. A and the Plaintiffs are therefore, unconcerned with any other construction. He submits that the Plaintiffs are entitled to the land beneath the building occupied by them and the 1st Defendant have never refuted their obligation to convey it. All the benefits and entitlements in so far as the Plaintiff's buildings are concerned, so also the land specified in the agreements, are not effected in any manner by the further construction proposed at the site. Shri. Samdani was at pains to point out that Section 7 of the Maharashtra Ownership Flats Act deals with any alterations or additions, in the structures described in the plans and specifications to the buildings in which the flats are agreed to be taken. These cannot be effected without the previous consent of the person to whom the flat is agreed to be sold. Further, No. alteration or addition in the structure of the building without the previous consent of all the persons who have agreed to take flats in such a building is permissible. He submits that Section 7A removes all doubts and points out that Clause (ii) of Section 7(1) is retrospectively substituted by Section 6(a) of the amended Act (2nd amendment of 1986). It shall be deemed to be effective as if the said Clause (ii) as substituted had been in force at all material times and all words and expressions appearing in the said

provision so also in Section 7(2) are not to apply in respect of the construction of any other additional building or structures constructed or to be constructed under the scheme or project of development in the lay out after obtaining the approval of the local authority in accordance with the building rules or bye-laws or any other law for the time being in force.

22. Shri. Samdani contends that the Ownership Flats Rules speak of particulars to be incorporated in the agreement (Rule 5). It is brought into force from 10th April 1987. Agreement with the flat purchaser has to be entered into in form No. v. and containing the particulars specified in Section 4(1)(a). Copies of documents specified in Section 4(1)(a)(b) have to be also attached. However, these provisions can have No. application to an agreement with the members of the Plaintiff No. 1 society. All agreements are admittedly of the year 1980-81. He submits-that the property was taken up for development in 1981. The building plans were sanctioned by the BMC in 1980. Various agreements with the flat purchasers on the basis of the plans sanctioned by the BMC are of the year 1982-84. Possession was given to the flat purchasers without occupancy certificate in 1984. It may be that the occupancy certificate is given later on but that by itself cannot mean that Rule 5 would apply. Therefore, the amended Ownership Flats Act can have No. application to the facts and circumstances of the present case. The law laid down in Jayantilal's case applies only to Agreement post second amendment to the Ownership Flats Act. Therefore, there cannot be any impediment or obstacle for the 1st Defendant to complete the construction at site and additional building can be put up by utilising the available FSI. This is the property of the 1st Defendant. Therefore, neither any prima facie case is made out nor there is any balance of convenience in favour of the Plaintiffs. Therefore, the Notice of Motion be dismissed.

23. In answer to this argument what is contended by Shri Anturkar is that the issue raised in the present case is that after registration of the society in 1990-91 the balance FSI is available to the Plaintiff No. 1 only and not the 1st Defendant builder/promoter. Assuming that there was any balance FSI was available and could have been utilised by the 1st Defendant builder, yet, if any construction further to the existing building is proposed but the same is not disclosed at the time of agreement with the flat purchasers then in the light of the law laid down by this Court and the Hon'ble Supreme Court, No. further construction activity is permissible. Construction of further building at the site would mean that the builder/promoter will not disclose the said construction in the original plans and yet proceed with it after registration of the society of the flat purchasers. That would mean that the land on which further construction is proposed will never become available to the co-operative housing society. Such can never be the intention of the legislature. Therefore, the Decision of the Hon'ble Supreme Court and the law laid down cannot be defeated in this manner. The argument is that Clauses 1 to 13 and 22 of the model form of agreement to be entered with the promoter and the purchasers of the flats as provided in form (V) of the Ownership Flats Rules is not the only basis on which

the Hon"ble Supreme Court rendered its decision in Jayantilal's Investments" case. The Supreme Court rendered its decision after analysing all statutory provisions. It did not refer to any clauses in the model agreement nor in form (V) referred to above. Therefore, the law laid down by the Supreme Court would apply to prior agreements and cannot be said to be restricted in its application to agreements executed on or after 10th April 1987. In this behalf, paragraph 17 of the Hon Tale Supreme Court decision in Jayantilal's case is indicative of the legislative intent. The 1st Defendant is misreading and mis-interpreting the Supreme Court decision and therefore the argument of Shri Samdani in that behalf should not be accepted.

24. This matter was heard fully by me and the parties desired to put in their written submissions. They sought time to do so only because they were awaiting the judgment and order of the Division Bench of this Court in Appeal No. 297 of 2008. According to them, this appeal which was directed against an ad interim order of the learned Single Judge (supra) was heard but, Order was reserved. However, the judgment and order was pronounced on 23rd October, 2008 and the view taken on 25th June 2008 by the learned Single Judge has been set aside. This will have great bearing on the subject-matter of the present suit, and the Notice of Motion. Therefore, they prayed for additional time which was granted. Subsequently, even that judgment became available and copy of the same has been placed on record for my perusal.

25. The only point therefore, arising for consideration is whether the Plaintiffs are entitled to the Injunction as prayed. Before me the facts, dates and events are undisputed. The only argument is further construction activity is impermissible in the light of the statutory provisions and the law laid down by the Hon"ble Supreme Court. Even at this prima facie stage, I will have to consider as to whether the Plaintiffs are right in their contention and have made out a prima facie case.

26. In Jayantilal Investments v. Madhu Vihar co-operative housing society, the argument before the Supreme Court was that on 26th August 1980 an agreement was arrived at between the vendor of the Appellants before the Supreme Court (Jayantilal) and Jayantilal in respect of the land which has been specifically described in para 2 of the Supreme Court decision. It appears from the said decision that there was a subsequent development in as much as the revised development plans proposed "40 feet" road and therefore the area of the property in question before the Supreme Court stood divided. On account of the division, a plot admeasuring 607 sq. meters emerged on the suit land. On 16th November, 1984 Jayantilal obtained NOC under the Urban Land Ceiling Act and the relief was to construct a building with 7 wings for weaker sections. The construction was to be made in accordance with the prevailing municipal Regulations, town planning requirements and statutory provisions. On 21st October 1985 the layout plan was sanctioned. It indicated one building with 7 wings. At that time due to existence of narrow road as Access, the promoter was

entitled to FSI of 0.75. The plan was amended in 1984, 1987, 1989, 1992 and 1994 without any objection from the flat purchasers. There was a revised layout plan which was approved for providing 5 wings having additional floors as well as FSI of 1.00. Due to construction of 44 feet wide D.P. road on the original plot admeasuring 855.54 sq. meters. The revised lay out plan is dated 6th May 1986. The flat purchasers entered into diverse agreements which are dated 7th December 1985, 11th April, 1987, 18th January 1989, 30th April, 1989 and 27th July 1991 etc.

27. On 12th November, 1986 the Ownership Flats Act was amended retrospectively inserting therein Section 7A and making provisions therein lifting the requirement of consent of the flat purchasers. The Supreme Court has observed that the amendment was restricted to the plots falling under a scheme or a project under the Layout Plan. The object behind enacting Section 7(A) was to overcome the judgment of this Court reported in Kalpita Enclave Co-operative Housing Society Ltd. and Others Vs. Kiran Builders Pvt. Ltd., , On 12th April, 1989 occupation certificate was issued in respect of construction carried out and which was the subject-matter before the Supreme Court. The possession of flats was handed over to the flat purchasers. Some flats remained to be sold and they stood in the name of the promoter Jayantilal.

28. On 25th March 1991 D.C. Rules were framed resulting in the increase of FSI from 1 to 1.8. on account of introduction of the concept of Transferrable Development Rights (T.D.R.). Therefore the layout plan before the Supreme Court was amended and Jayantilal obtained sanction on 25th May 1992 for construction of the building which was subject-matter of the Supreme Court. That construction was proposed of 6 wings by consuming balance ESI of 1. Jayantilal issued an advertisement for commencement of construction in accordance with the amended plan. That construction could not proceed on account of financial problems.

29. The co-operative housing society before the Supreme Court was registered on 20th January 1993. It appears that the layout plan was once again amended on 26th November, 1994 and a building with six wings was shown in the amended plan. This plan was duly sanctioned and it was sanctioned in favour of the promoter Jayantilal on account of purchase of additional TDR by it. The FSI stood increased on account of slum TDR and it became 2.00 instead of original 1.8.

30. The co-operative housing society before the Supreme Court filed Suit No. 4385 of 1997 against Jayantilal. This suit was filed on 12th August 1997 and apart from praying for conveyance to be executed the society claimed permanent injunction restraining the promoter from putting up further construction. It questioned the validity of the sanction given to the amended plan dated 29th March 2001. Thus, the sanction by the Competent Authority to the amended plan which permitted construction of 5 plus 2 wings by using available FSI was the subject-matter of the suit.

31. On 31st March 2004 the Bombay City Civil Court (trial Court) partly decreed the suit and permitted Jayantilal to complete construction as per the amended plan dated 29th April 2001. The trial Court also issued further directions for execution of the conveyance in favour of the co-operative housing society.

32. The co-operative housing society preferred first appeal being First Appeal No. 786 of 2004 being aggrieved by the directions to grant three years time to Jayantilal to execute the conveyance. Jayantilal preferred cross appeal being First Appeal No. 989 of 2004 and contended that No. time for execution of the conveyance can be set and such a promoter is entitled to exploit the full potential of the building in question and until it is utilised it was not statutorily obliged to execute the conveyance in favour of the co-operative housing society. The promoter placed reliance on Section 7A of the Ownership Flats Act.

33. On 16th March 2006 First Appeal No. 786 of 2004 filed by the society was allowed and since Jayantilal's appeal being First Appeal No. 989 of 2004 was dismissed, Jayantilal was directed to convey right, title and interest and execute all relevant documents in respect of the subject plot admeasuring 6071 sq. meters and restrained permanently from making any construction over the suit plot more particularly described in the judgment of the Supreme Court. The High Court held that Jayantilal was a promoter and Madhu Vihar co-operative housing society was floated by the promoter. That Madhurvihar project was undertaken in accordance with the layout plans and that the scheme was completed with construction of the flats/shops and garden. The society was registered on 20th January 1993 and therefore the Ownership Flats Rules mandated that Jayantilal should convey the title to the society. Jayantilal failed to do so even after the scheme was completed and possession of the flats was handed over to the flat purchasers. This Court held that the promoter was the trustee and there was an implied trust. u/s 7 of the MOFA, (Maharashtra Ownership Flats Act) the promoter was prohibited from putting up additional construction after the plans were disclosed to the flat purchasers and that the promoter was not entitled to make any alterations in the construction without consent of the flat purchasers nor can he make any addition in the structure without the prior consent of the society.

34. In this behalf, para 10 of the Supreme Court judgment is relevant and it reads thus:

By the impugned judgment, dated 16.3.2006 the Bombay High Court allowed First Appeal No. 786 of 2004 filed by the co-operative society and simultaneously dismissed First Appeal No. 989 of 2004 filed by the Appellant herein. By the impugned judgment, the High Court directed the Appellant to convey right title and interest and execute all relevant documents in respect of Madhuvihar scheme in CTS No. 1068/1 admeasuring 6071 sq.m situated at village Kandivali (West) Mumbai in favour of the cooperative society. By the impugned judgment the Appellant was restrained permanently from making any construction over the suit plot bearing CTS No. 1068/1 admeasuring 6071 sq. m situated at Kandivali

(West) Mumbai. By the impugned judgment the High Court held that the Appellant was a promoter that it had floated Madhuvihar scheme on the said plot; that Madhu Vihar was the scheme/project undertaken for development of the plot in accordance with the layout plan; and that the said scheme stood completed with the construction of the flats/ shops land the garden. By the impugned judgment it was further held that the society was registered on 20.1.1993 and under Rule 8 of the Maharashtra Ownership Flats (Regulation of the promotion of Construction, etc.) Rules 1964 (the Rules) the Appellant was statutorily obliged to convey the tide the society which they failed to do even after me scheme got completed and possession of the flats stood handed over to the flat takers. By the impugned judgment the High Court held that there was an implied trust created; that the promoter was the trustee and that the beneficiaries were the flat takers. By the impugned judgment it was further held that Section 7 of the MOFA the Appellant was prohibited from putting up additional construction after the plan stood disclosed to the flat takers; that the promoter was not entitled to make any alteration in the structure without the prior consent of the flat takers; that the promoter could not make any additions in the structure of the building without the prior consent of the society and that u/s 7A the said prohibition was not to apply in respect of the construction of any other. additional building or structure constructed or to be constructed under a scheme or a project of development in the layout plan. By the impugned judgment it has been held that me construction of Madhuvihar started in 1985 that Section 7A was inserted in 1986 and that Madhuvihar scheme got completed in 1989. According to the impugned judgment, between 1985 and 1989, the plans were changed at least four times and that No. additional wings like the one proposed in the plan approved on 29.3.2001 was ever included in the layout plans between 1985 and 1989 and therefore the Appellant promoter was not entitled to derive any benefit from Section 7A of MOFA and consequently, the Appellant was not entitled to construct additional building in the above suit plot. Hence, this civil appeal.

35. Thereafter, the Hon"ble Supreme Court considered the rival contentions and held that the legislature intended to regulate the activities of the promoter by retaining Sections 3 and 4 in the Ownership Flats Act. The question before the Supreme Court was whether one building with several wings would fall under the amended Section 7(1)(ii) and it is in that context that the Supreme Court made observations in para 17 which are relied upon by Shri Anturkar before me.

36. Thus, the Supreme Court was examining the ambit and scope of the amendments to the Ownership Flats Act made in 1986 and the rights of the flat purchasers so also the promoters flowing therefrom. The judgment does not hold that irrespective of the date of the agreement and the time during which it was executed that obligations under the Act have to be complied with. The Supreme Court in para 15 observed that the legislature retained Section 3 which imposes statutory obligation on the promoter to make full and true disclosures of the particulars mentioned in Section 3(2) including the nature, extent and

description of common areas and facilities. At the same time, the Supreme Court has observed that Sub-section (1-A) was introduced to Section 4 by the legislature in 1986 so as to make it binding on the promoter to enter into agreement with the flat purchasers in the prescribed form. Thus, while removing the impediments to full and complete exploitation of Development Potential, the Legislature retained the above obligations.

37. It is not possible to agree with Shri. Anturkar that the Supreme Court was dealing with a case of the nature before me. The Supreme Court was in fact dealing with a situation where the Agreements were admittedly entered into after the amendments to the Ownership Flats Act. None disputed before the Supreme Court that the amendment would apply. Such is not the case before me. Before me, the question is as to whether the agreement in the prescribed form which is to be entered into by the promoter in terms of the amended rule would be applicable to the agreements executed prior to the amendment. The format itself came into force in 1986 whereas the agreements in the case before me are admittedly executed prior to that date. To that extent, Shri Samdani appears to be prima facie right in his consternation that the requirement that every agreement between the promoter and the flat purchasers should comply with the prescribed form (V) is something which is not applicable to the instant case and more particularly the suit agreement. Once these agreements are not to comply with the amended provisions, then, it cannot be contended by the Plaintiff that they govern the field.

38. The alternate argument then canvassed was that the layout plan in the present case did not disclose that any building can come up in future. The argument is based upon some averments in the plaint but the 1st Defendant has filed a reply in which it has been specifically contended that the plot was developed by constructing building No. 1 on portion No. R.N. 4048 (1). This is part and parcel of the final plot No. 774. However, there is a second portion R.N. 4048 (1-A) of final plot No. 774 upon which the developer was to construct building No. 2 and for which plan was approved along with building plan for building No. 1. Reliance is placed upon the occupation certificate issued by the BMC dated 6th March 1997. In para 23 of the affidavit filed in reply to this Notice of Motion on 25th June 2007, the 1st Defendant has contended that building No. 1 was constructed by only using part of the FSI available on the plot and additional building can be put up by utilising the balance FSI. That FSI was decided to be exploited by approaching the BMC and the BMC granted its approval on 1st November, 1996. In that behalf, reliance is placed upon IOD dated 1st November, 1996 wherein it is clearly stated that the plans, sections, specifications with regard to building No. 1 on final plot No. 774 have to be complied with. Reliance is also placed upon the commencement certificate which talks of the proposed building No. 2. That intent was to develop the property and carry out construction of further buildings is evident in Clauses 1, 8 and 9 of the agreements. Before me it is not disputed that the agreements are common containing the same stipulations. In Clause 1 itself it is clarified that the party of

the first part i.e., Defendant No. 1 is constructing buildings known as "Jamuna Darshan A and B".

39. Clauses 1, 8 and 9 of the agreement are relevant for our purpose. This is an agreement entered into on 5th May 1982 and I do not see how the Plaintiffs can now contend that the stipulations therein do not bind them or that they are over-ridden by the amendment to the Ownership Flats Act.

40. Shri. Anturkar was fair enough to contend that there is nothing in the Ownership Flats Act which would enable the Plaintiffs to urge as above. As I have already held above that the Supreme Court decision in Jayantilal was considering a specific controversy and the law laid down therein must be seen in that backdrop, I am of the further view that para 17 of the said judgment cannot be read in isolation as is suggested by Shri. Anturkar. The said judgment must be seen in the context of the factual materials and the nature of the controversy raised before the Supreme Court. This judgment is therefore, of No. assistance to the Plaintiffs.

41. Lastly, the Single Judge's order has also been overruled by the Division Bench. The Division Bench set out the factual aspects in para 2 of its judgment and in para 3 held that the portion of the building A in that case was already constructed and the constructed building was occupied by the flat purchasers who are members of the co-operative housing society before this Court. The suit was filed voicing the grievance of the society who are in occupation of the respective flats and thereafter further developments have been noted resulting in the modified sanctioned plans permitting larger FSI. The Plaintiff's case is more or less identical and the Division Bench observed in para 6 as under:

Coming to the question as to whether the consent of flat owners is required by the developer/promoter for raising the additional structure/building the change in position of law will have to be addressed to. Section 7 of Maharashtra Ownership Flats Act, 1963 (MOFA for short) was interpreted by the Bombay High Court in Kalpita Enclave Co-operative Housing Society Ltd. and Others Vs. Kiran Builders Pvt. Ltd., holding that a promoter was not entitled to put up additional structure not shown in the original layout plan without consent of the flat purchasers. The said interpretation of Section 7 by the High Court prompted the legislature to amend Section 7. Section 7 was amended with retrospective effect and Section 7A was newly inserted which was of a clarificatory nature. By amending Section 7, the words " or construct any additional structures " were deleted. Section 7A which was newly added clarifies the position that the consent of flat holders in a building is not necessary in respect of construction in the scheme or layout after obtaining approval of the local-authority-in accordance with the building bye laws or Development Control rules. Section 7A thus does not enable the flat purchasers to prevent construction of the additional structures once the plan is modified and sanctioned under the building bye laws or Development Control rules.

42. The Division Bench also noticed in para 7 the judgment of the Supreme Court in Jayantilal and the very same para which is relied upon before me. In para 8 the Division Bench observed thus:

The learned Single Judge has placed emphasis on the observations made by the Supreme Court in M/s. Jayantilal Investments in para 17 of the judgment. It is observed therein that Clauses 3 and 4 of prescribed Form v. is statutory and mandatory and shall be retained in individual agreements between the promoter and the flat taker. However, while reproducing Clause 4 in the impugned order the learned Single Judge has also reproduced the deleted portion from the said clause and it appears to have relied upon the deleted portion as well. The following portion which has been extracted as part of Clause 4 has been deleted by a Notification issued in that regard: Whereas after the registration of the society the residual F.A.R. (F.S.I.) shall be available to the society." Clauses 3 and 4 oblige the promoter under MOFA to make true and full disclosure even after inclusion of Section 7A. It will have to be seen with reference to the terms of the agreements as to whether the promoter/developer has made true and full disclosure.

The main grievance of the Plaintiffs is that the FSI revealed in the agreements entered into in the year 1988 with the flat purchasers clearly reveals the FSI proposed to be consumed to be 249.84 sq. meters; whereas the modified plan shows the FSI to be 4460 sq. meters. This increase is obviously by utilising the floating FSI/transferable development rights (for short TDR) of another property to the extent of 1970 sq. meters. According to the Plaintiffs, this use of floating FSI/TDR has not been stated and/or represented to the flat purchasers. According to the Defendants the concept of TDR was not prevailing in the year 1988 when Defendant No. 1 had entered into agreement with the flat purchasers and the same has been introduced for the first time in the year 1991 on account of changes brought about in the Development Control Rules. According to the learned Counsel for the Appellants the promoter/developer cannot be blamed for the so called non-disclosure of their intention to use the TDR in the year 1988 as such loading of TDR was for the first time permitted in the year 1991. It cannot thus be said to be a non disclosure because the same was then not even known to the builder/promoter. The said submission deserves consideration. This issue, with respect to the learned Single Judge, has not been addressed.

43. It is in this light that the order passed by the learned Single Judge was reversed by the Division Bench. The factual position is more or less identical. It is not the case before me that the developer did not disclose the details of the FSI at the time when the agreement was entered into with the flat purchasers. On the other hand, the argument is that the layout plans did not disclose the proposed building. That argument cannot be accepted. If that is accepted then the Division Bench ruling and stipulations in the agreement will have to be given a complete go-by. That is not permissible in law so also on facts. That apart, the layout plans were attached to the agreement for sale executed with the members

of the flat purchasers of the Plaintiff No. 1 society and it is the specific case of the 1st Defendant that it showed the proposed construction. The 1st Defendant has made a serious grievance that the Plaintiff has annexed only the agreements leaving out the layout plan which is attached thereto. The layout plan has been produced before me during the course of the arguments and on perusal there of prima facie the 1st Defendants appear to be right in their contention.

44. In the result, I am of the opinion that the Plaintiffs have failed to make out a prima facie case for grant of the Interim injunction. The balance of convenience is also not in favour of the Plaintiffs and the motion therefore, deserves to be dismissed. It is accordingly dismissed. However, it is clarified that all observations are prima facie and shall not affect the final out come of the Suit. Similarly, these observations do not affect the rights and contentions of parties in Suit No. 729 of 1981. The observations are restricted to the obligations of Defendant No. 1 Qua the Plaintiffs herein.